

VZCZCXRO9536
PP RUEHROV
DE RUEHNR #1301/01 1421049
ZNY CCCCC ZZH
P 211049Z MAY 08
FM AMEMBASSY NAIROBI
TO RUEHC/SECSTATE WASHDC PRIORITY 5841
INFO RUCNIAD/IGAD COLLECTIVE
RUEHDS/AMEMBASSY ADDIS ABABA 0083
RUEHDR/AMEMBASSY DAR ES SALAAM 5972
RUEHDJ/AMEMBASSY DJIBOUTI 5266
RUEHKM/AMEMBASSY KAMPALA 2809
RUEHKH/AMEMBASSY KHARTOUM 2044
RUEHLO/AMEMBASSY LONDON 2816
RUEHFR/AMEMBASSY PARIS 2739
RHMFISS/CDR USCENTCOM MACDILL AFB FL
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C O N F I D E N T I A L SECTION 01 OF 03 NAIROBI 001301

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E.O. 12958: DECL: 05/19/2018

TAGS: [PHUM](#) [PGOV](#) [KDEM](#) [KE](#)

SUBJECT: INDEPENDENT REVIEW COMMISSION CHAIR PUZZLED BY
LACK OF EVIDENCE

REF: A. NAIROBI 869

[1](#)B. NAIROBI 199

Classified By: Ambassador Michael Ranneberger for reasons 1.4 b, d

SUMMARY

[1](#)1. (C) The Ambassador and Emboffs recently met with Independent Review Commission (IREC) Chairman Judge Johann Kriegler to discuss IREC's top-to-bottom review of Kenya's electoral system and the bungled 2007 presidential elections (ref A). The Commission has a two-part mandate: (1) to assess and make suggestions for improving Kenya's electoral framework; and (2) assess the integrity of the December 2007 presidential election results. Kriegler fully expects the Commission to complete its mandate within six months, which will allow its recommendations to be incorporated into the constitutional reform process. He lamented the fact, however, that the Commission has not yet received evidence he feels is specific enough to point the finger at individual ECK officials. In the coming weeks, IREC will hold a series of public meetings in provincial capitals to allow the public its say and give it the opportunity to provide evidence. Unless it becomes more aggressive in searching for damning information, IREC may fail to shed light on the bungled presidential election. The Kenyan public is likely to be sorely disappointed. We are working to share appropriately sanitized USG information on electoral irregularities. End Summary.

IREC To Deliver Report on Time

[1](#)2. (C) In separate meetings with the Ambassador and Emboffs, Kriegler detailed the two streams of IREC's work: (1) a technical assessment of Kenya's electoral framework; and (2) an assessment of the voting and tallying of the December 2007 elections. He stated that IREC intends to deliver its report within the six-month time frame given by its terms of reference, which means the report should be ready by September.

[1](#)3. (C) Thirteen separate pieces of legislation currently regulate Kenya's electoral system. Kriegler stated that IREC will propose draft legislation aimed at unifying this legal framework. It will also propose draft constitutional

language to regulate the Electoral Commission of Kenya (ECK) structure, appointment of Commissioners (to include a non-partisan or multi-partisan process for nominating Commissioners), and security of tenure for Commissioners. IREC will also propose options to reform Kenya's "first-past-the-post" (i.e., winner-take-all) electoral system, although Kriegler admitted IREC is unlikely to reach consensus on any one electoral system reform proposal. IREC Secretary, Jorgen Elkit, who also attended the meetings, was more blunt, stating that once parties see the likelihood of benefiting from the current flawed electoral system, they may be unwilling to change it.

¶4. (C) On the politically contentious presidential elections, Kriegler stated that IREC's report will assess the integrity, not the accuracy, of the announced result. He declared that IREC intends to provide adversely-named persons full opportunity to confront witnesses and evidence before naming them as wrongdoers in its report.

Lack of "Hard Evidence" Hinders Investigations

¶5. (C) Kriegler outlined IREC's public relations campaign to solicit testimony and evidence from the public. Kriegler acknowledged that the Commission had received submissions from individuals, political parties, and observer missions (such as the EU and the Commonwealth), but that they lacked "hard evidence." (Note: In Kreigler's mind, "hard evidence" provides information about who altered results and when and

NAIROBI 00001301 002 OF 003

how they did it. End Note.) IREC's target deadline for submissions was May 16, but given the paucity of evidence they would continue accepting submissions after that date. He noted that, to further encourage people to come forward, IREC has established a firewall between the Commissioners by assigning the task of taking evidence to a completely neutral investigative branch with a Tanzanian lead counsel. Despite these efforts, Kriegler noted with frustration that IREC has not yet received "single bit of hard fact." Kriegler downplayed the need for witness protection, citing the firewall and the possibility that "arrangements" could protect those coming forward (i.e. asylum).

¶6. (C) Kriegler was perplexed that the Orange Democratic Movement (ODM), which has portrayed itself as the aggrieved party at the elections, has not submitted any hard evidence despite the number of observers it had in the field and the ECK's central tallying center. IREC Secretary Elkit speculated that the formation of a grand coalition decreases the incentive for either side to press their case lest they disturb the fine balance between them. (Comment: A simpler answer may be that ODM was shut out of the ECK's central tallying center, where the tampering was taking place and thus cannot present direct evidence of tampering. End Comment.)

¶7. (C) IREC is negotiating with media houses to get tapes of live-feed election returns. If obtained, this key data would allow IREC to identify report delays in problematic constituencies by comparing when media in the field declared announced results with ECK records of when these results were received and announced. With this in mind, Polcouns gave Kriegler her reconstruction of the conflicting returns data (ref B), which Kriegler thought would prove useful to IREC's efforts.

Taking the Show on the Road

¶8. (C) IREC will organize public sessions in each of Kenya's provincial capitals, as well as in locations where there are indications of electoral malfeasance. The purpose of the

meetings is two-fold: to allow people outside Nairobi to be heard on issues of electoral reform; and provide an opportunity for individuals to come forward with evidence.

¶9. (C) Kriegler was pessimistic that IREC would get actionable information as a result of either the road show or submissions to its Nairobi headquarters. He posited that this lack of information would cause serious public relations issues for IREC, as the public is looking to the IREC to apportion blame for the elections. Kriegler indicated IREC's willingness to become proactive in its search for data if none is supplied by the public, but emphasized that he did not want to resort to "fishing" for leads while questioning ECK officials.

The ECK - the Elephant in the Room

¶10. (C) According to Kriegler, the ECK was initially hesitant, but has been generally positive in its relations with IREC. From its side, Kriegler noted that IREC has been at pains to "play nice" with the ECK, but stated there is "enough time for things to get ugly." He noted that, given the lack of evidence available to it, IREC has not yet figured out what evidence it will seek from the ECK. IREC will not be afraid to use its power to compel testimony and evidence from the ECK, but IREC will try to obscure what information IREC is seeking to limit tampering with evidence. Kriegler commented that, due to his experience as a trial lawyer, he is reluctant to ask ECK officials questions to which he does not already have the answer.

¶11. (C) One of the key figures in the election fiasco, ECK Chairman Samuel Kivuitu, has been defiant about his role. Kivuitu recently appeared at a recent discussion group exploring the link between Kenya's election laws and

NAIROBI 00001301 003 OF 003

electoral violence. He offered a mix of excuses and untruths to explain his and the ECK's role in the elections. He rightly pointed out that the absence of quick and secure results reporting procedures proved to be critical weakness, but omitted the fact that the ECK had failed to implement a USAID-funded system created to do just that. (Note: The ECK refused outright another USAID offer to fund a secure text-messaging reporting system. End Note.) Several attendees asked Kivuitu why he refused to accept responsibility for the bungled elections and the ensuing violence and resign. Kivuitu pointedly stated that he felt no need to resign and would go when he was ready. Hinting at what he might tell IREC if he is called to testify, Kivuitu stated that his physical health was so poor from April through December 2007 that he is unlikely to have been involved, or to be able to recall, many decisions that were made. Despite such incredible claims, those in attendance were willing to suspend their disbelief, and gave a surprisingly warm response to Kivuitu, often laughing at the cutting comments he made about his detractors.

COMMENT

¶12. (C) It is good news that IREC intends to deliver its report by September, as Kenya's constitutional reform process should be in full swing by then. Kriegler has received ample evidence from multiple sources that results were altered, but, as a former trial lawyer, he wants to be able to name who did what, when, and how. The absence of information providing this level of detail clearly distresses Kriegler. However, Kriegler's hope of waiting for people to come forward with a smoking gun is perhaps unrealistic. Kriegler downplays several factors which act to deter those possessing inside knowledge of tampering from giving evidence. While he made it clear to us that the Commission was willing to accept

anonymous tips to direct their investigation, it is unlikely that ECK insiders are aware of this fact. Also, the absence of witness protection in a culture of impunity acts as a second strong disincentive to come forward and implicate powerful people (who, Kriegler made clear, will have ample opportunity to defend themselves). Finally, the political landscape has shifted with the formation of a grand coalition. The ODM leadership no longer has such a strong interest in using the IREC process to tarnish its PNU partner. Doing so might rock the boat and boomerang on ODM by increasing tension and instability in the government. Unless the Commission gets more aggressive in its approach to uncovering damning evidence, IREC risks failing in what is at least in the Kenyan public's eye, its primary goal -- uncovering what went wrong in the presidential elections. We will share what information we can with IREC. As it moves forward and proposes reform, we will weigh in to ensure that IREC's efforts to rework Kenya's broken electoral system are not ignored. End Comment.

RANNEBERGER